IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

THE ESTATE OF DUANE WILLIAMS; TERI R. WILLIAMS AS ADMINISTRATRIX OF THE ESTATE; AND SARA DIDONATO MANELSKI, AS NEXT FRIEND AND GUARDIAN AD LITEM FOR HANNAH MARIE DIDONATO, A MINOR	)	
Plaintiffs,	)	
v.	)	C.A. No. 09C-12-126 WCC
CORRECTIONAL MEDICAL SERVICES, INC., A FOREIGN CORPORATION; CORRECTIONAL MEDICAL SERVICES OF DELAWARE, INC., A DELAWARE CORPORATION; DELAWARE DEPARTMENT OF CORRECTIONS AND PETER F. BINNION M.D.	)	
Defendants.	)	

Submitted: April 26, 2010
Decided: July 23, 2010

On Defendant's Motion for Judgment on the Pleadings
GRANTED IN PART/ DENIED IN PART

On Plaintiffs' Motion to Amend Complaint
GRANTED

OPINION

Bartholomew J. Dalton, Esquire; Dalton & Associates, P.A., 1106 West 10th Street, Cool Spring Meeting House, Wilmington, DE 19806. Counsel for Plaintiffs.

James E. Drnec, Esquire; Balick & Balick, LLC, 711 N. King Street, Wilmington, DE 19801. Counsel for Correctional Medical Services, Inc., Correctional Medical Services of Delaware, Inc., and Peter F. Binnion, M.D.

Catherine Damavandi, Esquire; Department of Justice, 820 N. French Street, 6th Floor, Wilmington, DE 19801. Counsel for Delaware Department of Correction.

CARPENTER, J.

Before this Court is Defendant's Delaware Department of Correction ("DOC") Motion for Judgment on the Pleadings and Plaintiffs' Estate of Duane Williams, Teri Williams, Sara DiDonato Manelski, and Hannah Marie DiDonato (together "Plaintiffs") Motion to Amend the Complaint. Based upon the reasons set forth below, the Court will partially grant the Motion for Judgment on the Pleadings and grant the Motion to Amend the Complaint.

Facts

On September 1, 2005, Duane Williams ("Williams") was committed to the Department of Correction at the Howard R. Young Correctional Institution ("HRYCI"). In early March 2007, Williams began experiencing numerous chronic medical ailments and was treated by Correctional Medical Services ("CMS"), the medical provider contracted by DOC to provide medical care to its inmates. As part of its treatment, CMS prescribed a series of medications, including Zocor, Prafon Forte and Tylenol, which were allegedly toxic to Williams's liver. In December of 2007, Williams began experiencing poor appetite, nausea, fatigue, and abdominal discomfort. He died of liver failure on March 12, 2008 at the age of thirty-three.

Procedural History

Plaintiffs commenced this action on behalf of the estate of Mr. Williams on December 10, 2009 and the complaint contained two counts. The first was a medical

malpractice claim against Dr. Binnion, an employee of CMS, and CMS individually. The second count related to the same medical care given to Williams but was asserted in a 42 U.S.C. § 1983 claim against Dr. Binnion, CMS and DOC. On March 25, 2010, DOC moved for judgment on the pleadings. Plaintiffs filed their response to DOC's motion and also moved to amend the complaint on April 16, 2010. The motion requested the Court's permission to add Carl Danberg, the DOC Commissioner ("the Commissioner") to the § 1983 count both in his individual and official capacity, and to add a third count asserting a second § 1983 claim for negligent hiring, retaining and supervision which named the three original defendants and the Commissioner as defendants. This is the Court's findings after conducting oral argument on these motions.

Standard of Review

Pursuant to Superior Court Civil Rule 12(c), a party may move for judgment on the pleadings "[a]fter the pleadings are closed but within such time as not to delay the trial."[1] When deciding a Rule 12(c) motion, the nonmoving party is entitled to the benefit of any inferences that may fairly be drawn from its pleading.[2] The motion should be granted when no material issues of fact exist and the movant is entitled to

[1] *See* Super. Ct. Civ. R. 12(c).
[2] *Gonzales v. Apartment Communities Corp.*, 2006 WL 2905724, at *1 (Del. Super. Oct. 4, 2006) (citing *Harman v. Masoneilan Intern., Inc.*, 442 A.2d 487 (Del. 1982)).

judgment as a matter of law.[3]

A party may amend its pleadings pursuant to Superior Court Civil Rule 15(a) after responsive pleadings are filed and "only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires."[4] Therefore, the trial court has broad discretion in permitting or refusing an amendment to a complaint.[5] Absent a showing of substantial prejudice or legal sufficiency, the court "must exercise its discretion in favor of granting leave to amend."[6]

The Defendant presents four issues in its Motion for Judgment on the Pleadings: (1) DOC is not a "person" under 42 U.S.C. § 1983; (2) the claims against DOC are barred by sovereign immunity; (3) medical negligence is not a cause of action under 42 U.S.C. § 1983; and (4) Plaintiffs' complaint is time-barred. Because the issues in both motions are intertwined, the Court will address the motions together.

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[3] *Gonzales*, 2006 WL 2905725, at *1 (citing *Warner Comm., Inc. v. Chris-Craft Indus.*, 583 A.2d 962, 965 (Del. Ch. 1989)).
[4] *See* Super. Ct. Civ. R. 15(a).
[5] *Howell v. Kusters*, 2010 WL 877510, at *1 (Del. Super. Mar. 5, 2010).
[6] *E.I. du Pont de Nemours & Co. v. Allstate Ins. Co.*, 2008 WL 555919, at *1 (Del. Super. Feb. 29, 2008) (citing *Mullen v. Alarmguard of Delmarva, Inc.*, 625 A.2d 258, 263 (Del. 1993)).

A. Whether Count II of The Complaint Can Be Amended To Add The Commissioner In His Individual and Official Capacity

Whether the Commissioner can be added as a party to the complaint and if so, whether that pleading has a legal basis to withstand the Defendant's motion is a two-fold question. First, the Court must determine whether the Commissioner can be appropriately added under Superior Court Civil Rule 15(a). If the Court determines that the requirements of the rule have been met, the next question is whether the claims against the Commissioner are barred by the established case law involving suits against government employees pursuant to 42 U.S.C. § 1983.

As to the first question, Rule 15(a) directs the liberal granting of amendments "when justice so requires."[7] It is well established that leave to amend under Rule 15(a) should be freely given unless there is evidence of undue delay, bad faith or dilatory motive on part of the movant, repeated failure to cure deficiencies, prejudice, futility, or the like.[8]

In its response, Defendant does not contend that Plaintiffs engaged in any of the tactics listed above which would cause a court to deny an amendment. Furthermore, because the Commissioner was notified of the lawsuit and served with

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[7] *Parker v. State*, 2003 WL 24011961, at *3 (Del. Super. Oct. 14, 2003) (citing *Hess v. Carmine,* 396 A.2d 173, 177 (Del. Super. 1978)).
[8] *Id.*

a copy of the complaint, the Court cannot find that the Commissioner would be prejudiced if added as a party. Because the parties are at the pleadings stages, and because at such juncture amendments should be "freely given," the Court is inclined to find the requirements of Rule 15 have been established that would allow the Plaintiffs' amendment to add the Commissioner as a party.

However, although the Court finds the requirements of Rule 15 have been met, it must then ask whether there is a legal basis to allow the Plaintiffs' amendment to proceed as a § 1983 claim. In its motion for judgment on the pleadings, the Defendant argues that the claims against the Commissioner are barred based upon the United States Supreme Court holding in *Will v. Michigan*[9] which ruled that State officials acting in their official capacities are not "persons" within the meaning of § 1983.[10] Section 1983 provides the following:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. [11]

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[9] 491 U.S. 58 (1989).
[10] *Id.*
[11] *See* 42 U.S.C. § 1983.

In concluding that state officials are not considered "persons" under § 1983, the Court reasoned that although state officials literally are persons, a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office.[12] As such, it is clear that assertions regarding the Commissioner's action in his official capacity would be barred.

Unfortunately, this same protection is not afforded to a public official who is acting in his individual capacity. However, for such a claim to survive, the standard is quite high. It cannot be established by merely asserting a claim of respondent superior or by general assertions that the government official knew of inadequate treatment being given to inmates and therefore the knowledge of the defendant's medical conditions would be generally imputed to him.[13] For an individual's § 1983 claim to survive, the plaintiff is required to establish the government official's personal involvement or actual knowledge in the alleged Constitutional violation.[14] In other words, the Plaintiffs must show that the Commissioner was deliberately indifferent to Williams's medical condition having actual knowledge and acquiescence in the improper medical treatment provided to Mr. Williams.[15]

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[12] *Will*, 491 U.S. at 71.
[13] *Deputy v. Roy*, 2003 WL 367827, at *2 (Del. Super. Feb. 20, 2003).
[14] *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948 (2009).
[15] *See Amaro v. Taylor*, 170 F. Supp. 2d 460, 464-65 (D. Del. 2001) (holding that an action against the Attorney General in her individual capacity is barred because she did not have any personal involvement or actual knowledge).

The Plaintiffs assert that the Commissioner's personal involvement is found through his statements made in numerous newspaper articles, legislative hearings, and in the United States Department of Justice investigation which are evidence that DOC and CMS routinely failed to provide appropriate medical care to inmates.[16] However, simply asserting that the Commissioner has administrative oversight of DOC and a general knowledge of unsatisfactory medical care to inmates is not sufficient. Such allegations are not "made with appropriate particularity" to establish personal involvement that would overcome the Constitutional bar to such action.[17]

While the Court has significant concerns about the Plaintiffs' ability to reach the necessary threshold to establish the personal involvement standard, it must be cognizant of the litigation posture of this case, and that the motion before it is one for judgment on the pleadings and not summary judgment. Since the amendment to the complaint asserts alleged personal knowledge by the Commissioner of Williams's medical condition, the Court will not grant the motion for judgment on the pleadings as to Count II at this time. Instead, it will defer ruling on the motion and allow the Plaintiffs some limited discovery to determine whether the claim can in good faith be pled with greater particularity. Therefore the Plaintiffs have 120 days from the date

[16] Pls.' Opp'n to Def.'s J. on the Pleadings ¶ 7.
[17] *Parsons v. Mumford*, 1997 WL 819122, at *4 (Del. Super. Nov. 25, 1997).

of this Opinion to conduct discovery and file a second motion to amend which would establish the particularity requirements set forth above. If the Plaintiffs fail to file such motion because they have no good faith basis to do so, or if the subsequent motion is denied by the Court, the present motion for judgment on the pleadings as to the Commissioner will be granted at that time.

B. Whether DOC Is A "Person" Pursuant To 42 U.S.C. §1983 And Whether Claims Against DOC Are Barred By Sovereign Immunity

DOC next contends that 42 U.S.C. § 1983 prohibits violations of constitutional rights only by a person or persons acting under "color of state law,"[18] and DOC is outside the class of "persons" subject to liability under § 1983.

The Eleventh Amendment of the U.S. Constitution prohibits courts from hearing actions naming a state as a defendant without its consent. This state immunity also extends to state agencies.[19] The United States Supreme Court has also held that states and state entities are not considered "persons" under 42 U.S.C. § 1983.[20] However, sovereign immunity can be waived by the General Assembly through an Act that clearly evidences an intention do so.[21] Furthermore, sovereign immunity may be waived for insured risks under 18 *Del. C.* § 6511.

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[18] Def.'s Mot. for J. on the Pleadings ¶ 3.
[19] *Murphy v. Correctional Serv.*, 2005 WL 2155226, at *2 (Del. Super. Aug. 19, 2005).
[20] *See Will*, 491 U.S. at 58.
[21] Del. Const. art. I, § 9; *Shellhorn & Hill, Inc. v. State,* 187 **A.2d 71, 74 (Del. 1962).**

The Plaintiffs do not contend that the General Assembly showed any intent to waive sovereign immunity, but instead indicate that the State has failed to affirmatively document the lack of insurance. Generally, defendants asserting sovereign immunity often submit affidavits from state officials indicating that the State has not obtained insurance to cover the litigated loss.[22] While such documentation had not been provided to the Court prior to the hearing on these motions, it was provided during the hearing to counsel and there appears to be no dispute that the State has not contracted for insurance to cover these risks. As such, sovereign immunity will prevent this action from proceeding against DOC and the motion for judgment on the pleadings as to DOC is granted.

C. Whether Plaintiffs Can Amend The Complaint To Add A Second § 1983 Claim Relating to Negligent And Reckless Hiring, Retention And Supervision Claims Against DOC And The Commissioner

Plaintiffs next seek to amend the complaint to add a third count asserting negligent and reckless hiring, retention and supervision claims against CMS, DOC and the Commissioner.[23] Recognizing such motions are liberally granted, the Court will allow the motion but will then also grant DOC's motion for judgment on the pleadings as to this count. It is first important to recognize that this claim has been

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[22] *Harrison v. State*, 2008 WL 444731, at *3 (Del. Super. Oct. 2, 2008).

[23] Dr. Binnion is also named as a Defendant in this count but the allegations as to him are simply a restatement of the medical negligence claim found in Count I.

asserted in the context of a § 1983 action. As such, the Court's earlier decision regarding DOC as a party to such actions and the Commissioner acting in his official capacity would also apply here. Simply put, regardless of how the Plaintiffs may spin their claim, they may not bring a § 1983 action against this State agency or its Commissioner when the conduct was performed as part of its official duties.

After carefully reviewing this proposed amendment, the Court finds that all of the conduct asserted would have been performed by the Commissioner in his official capacity. While the Plaintiffs attempt to save this claim by asserting in a single paragraph the phrase "in his individual and official capacity" the Court finds the clear import of the Plaintiffs' assertion is that the Commissioner negligently or recklessly failed to perform his responsibility as Commissioner to properly supervise the company DOC had contracted to provide health services for its inmates. Any conduct in this vein would be consistent with the official duties and responsibility as Commissioner and not ones outside of that context. Therefore, even if the Court accepts all of the allegations of this amendment as true, the Plaintiffs fail to assert a basis to hold the Commissioner individually liable in a § 1983 context. As such, the Court will grant DOC's motion for judgment on the pleadings as to this count as there is no good faith legal basis to support the claim against DOC or the Commissioner. However, since the Court has received no objection from CMS or Dr. Binnion, the

amendment adding this count may proceed against those Defendants.[24]

D. Whether Plaintiffs' Amendments Are Time-Barred

Lastly, Defendant contends that the Plaintiffs' claims are time-barred by the statute of limitations under 10 *Del. C.* § 8119 which states "[n]o action for recovery of damages shall be brought after the expiration of two years from the date upon which it is claimed that the injuries were sustained." Furthermore, that for medical malpractice claims, the statute of limitations begins to run on the date when the allegedly negligent acts or omission occurred.[25] Based upon the Plaintiffs' allegations that Williams was administered the toxic drugs on March 9, 2007, Defendant believes Plaintiffs' claim should have been filed no later than March 9, 2009. Plaintiffs' claim was filed on December 10, 2009.

Based upon the record, the Court believes that the "time of discovery rule" tolls the statute of limitations. Under this rule, the statute of limitations does not begin to run until the discovery of facts constituting the basis of the cause of action or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery of such facts.[26] In order for the rule to apply the only two requirements are (1) an inherently unknowable injury and

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[24] The Court believes the rulings it has previously made moots the Defendant's argument regarding whether medical negligence is a cause of action under 42 U.S.C. § 1983 and therefore that argument will not be addressed.
[25] Def.'s Mot. for J. on the Pleadings ¶ 9 (citing to *Dambro v. Meyer*, 974 A.2d 121, 132 (Del. 2009)).
[26] *Estate of Buonamici v. Morici*, 2010 WL 2185966, at *3 (Del. Super. June 1, 2010).

(2) a blamelessly ignorant plaintiff.[27] The statute of limitations starts to toll when the injury begins to manifest itself and becomes physically ascertainable.[28]

Although the toxic medication may have been administered to Williams on March 9, 2007, it was not until December 2007 that Williams began showing adverse physical signs and symptoms as a result of his medication reflecting possible liver dysfunction. Because the effects of the drug would not have been known until its physical manifestation, the Court believes that the statute of limitations would only start to toll at the time such physical manifestation was present. Here, Williams started showing physical symptoms in December 2007. There is also no indication that Williams knew or had reason to know that the drugs administered were toxic to his liver prior to the onset of the physical manifestation. As such, the Court finds the Plaintiffs' complaint timely and the amendments are also timely as they relate back to the original complaint.

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[27] *Id.*

[28] *Id.* at *4.

Conclusion

For the foregoing reasons, the Court:

(A) Grants Plaintiffs' Motion to Amend the Complaint;

(B) Grants DOC's Motion for Judgment on the Pleadings dismissing DOC from the litigation;

(C) Grants DOC's Motion for Judgment on the Pleadings as to Count III of the Complaint dismissing DOC and the Commissioner from that Count;

(D) Defers final judgment on DOC's Motion for Judgment on the Pleadings as to Count II of the Complaint relating to the conduct of Commissioner Danberg for 120 days.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.